

STATE OF MICHIGAN
COURT OF APPEALS

RUTH JAYNES, as Personal Representative of the
ESTATE OF GREGORY JAYNES,

UNPUBLISHED
October 6, 2009

Plaintiff-Appellant,

v

No. 287427
Kalamazoo Circuit Court
LC No. 08-000054-NM

SUALEH KAMAL ASHRAF, MD, and
BORGESS MEDICAL CENTER,

Defendants-Appellees,

and

MICHAEL P. HALPIN, MD,

Defendant.

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In this medical malpractice suit, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of all defendants. Plaintiff does not here appeal the trial court's decision in favor of defendant Halpin; the liability of defendant Borgess Medical Center (BMC) is vicarious only; plaintiff does not allege any independent negligence by BMC. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent, suffering from "chest discomfort," went to the emergency room of his local hospital, Borgess-Pipp in Plainwell. It quickly became clear that time was of the essence, and the emergency room physician, Dr. Fish, recognized that decedent could suffer a ruptured aortic aneurism at any moment and so wanted to transport decedent to a larger facility as soon as possible:

I discussed the case with [defendant] Dr. Ashraf, cardiologist, and also Dr. Robert Hill, emergency room physician at Borgess Medical Center. They are both willing to accept the patient to the emergency room, and the patient left as quickly as possible from this emergency room. Greg and his wife seem to understand the gravity of the situation

* * *

We decided not to do a computerized axial tomography scan here as we have no surgeon here, in the event he should burst an aneurysm here at this facility. He seemed to understand the advantage of quick matriculation to Borgess Medical Center and agreed to accept the risk of transfer and the above plan, as did his wife.

The transporting ambulance arrived at BMC about 15 minutes after leaving Borgess-Pipp. The immediate differential diagnosis was acute myocardial infarction or aortic dissection. Decedent was immediately given a CT scan; within one-half hour the results of the scan were available and showed an extensive aortic dissection. The emergency room physician, Dr. Hill, and the vascular surgeon present, Dr. Jain, consulted with defendant Dr. Halpin, a thoracic surgeon, who indicated that, "this problem could not be easily addressed" at BMC. Dr. Hill contacted physicians at the University of Michigan's hospital (UM), who agreed to take decedent. Dr. Hill noted, "[H]e began to develop progressively worsening lethargy with what appeared to be a central neurologic breathing pattern, e.g., abdominal breathing with little chest motion." Transportation to Ann Arbor was arranged by ambulance. Dr. Hill's notes indicate, "There was no available helicopter service based on weather conditions and availability of other helicopter services." Surgery took place over the course of the night, lasting some 14 hours into the next morning. Decedent remained in intensive care until he died late that night.

Plaintiff seeks to hold Dr. Ashraf liable and BMC vicariously liable for accepting decedent at BMC when decedent exhibited classic symptoms of aortic dissection, which BMC was not capable of addressing. Plaintiff asserts that critical time was wasted at BMC by Dr. Ashraf's decision to accept decedent at BMC.

Dr. Ashraf moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that there was no physician-patient relationship because he never provided any care or treatment. Defendant BMC also moved for summary disposition, arguing that if Ashraf was not liable, then it could not be held vicariously liable and must be dismissed. The trial court agreed, citing *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998), for the rule that a physician impliedly consents to a physician-patient relationship when he has done something, such as participate in the patient's diagnosis and treatment, that supports the implication. Because Dr. Ashraf did not participate in decedent's diagnosis or treatment, did not examine decedent, never reviewed decedent's records, and was not summoned to consult with the treating physicians, there were no actions taken that would lead to the implication of consent. The trial court granted summary disposition to both Dr. Ashraf and BMC.¹

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come

¹ The court also granted the motion of Dr. Halpin, who is not a subject of this appeal.

forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The existence or nonexistence of a legal duty is a question of law for the court to decide. *Oja*, *supra* at 187. In medical malpractice actions, the duty owed by a physician arises from the physician-patient relationship. *Id.* “A physician-patient relationship exists where a doctor renders professional services to a person who has contracted for such services.” *Hill v Koksky*, 186 Mich App 300, 303; 463 NW2d 265 (1990). A physician merely discussing a patient with another physician is not enough to establish a physician-patient relationship. *Id.* at 304. In *Hill*, this Court held that there was no physician-patient relationship where the defendant doctors were contacted by the plaintiff’s doctor and rendered opinions about the case over the telephone but had never examined the plaintiff or reviewed her chart. The defendants did not examine, speak with, or prescribe a course of treatment for the plaintiff; instead, their opinions formed “part of the body of information available” to the treating physician. *Id.* at 305. Similarly, this Court found no physician-patient relationship in *Oja*, where the defendant doctor offered his opinion regarding the course of treatment when he was on call and the emergency room resident telephoned him. *Oja*, *supra* at 187. Rather, the physician must actively participate in the patient’s care or essentially direct the course of the patient’s treatment. *Id.*; *NBD v Barry*, 223 Mich App 370; 566 NW2d 47 (1997).

The trial court did not err in granting defendants’ motion. Dr. Ashraf’s only involvement was agreeing to perform a cardiology consult when decedent arrived at BMC; however, this was never required because the CT scan indicated that a surgeon, not a cardiologist, was needed. As in *Hill* and *Oja*, Dr. Ashraf did not order Dr. Fish to send him decedent, did not direct any treatment for decedent, did not examine decedent, and did not provide any services to decedent. Dr. Ashraf’s agreeing to accept decedent at BMC formed part of the body of information available to Dr. Fish when he made the decision to send decedent there instead of somewhere farther away. Even though Dr. Fish’s notes indicated he was sending decedent to Drs. Hill and Ashraf, at that point the diagnosis was insufficient to determine whether decedent suffered from myocardial infarction, which would require Dr. Ashraf’s services, or an aortic dissection, which would not. Once the CT scan was done, it became clear that Dr. Ashraf’s services were not needed. Nor does the presence of Dr. Ashraf’s name on some of the bills from BMC establish that he rendered treatment. The entire time decedent was at BMC, he was overseen either by Dr. Hill or Dr. Jain. As soon as the CT scan results were known, it was clear that the services of a cardiologist were not needed, nor is there any indication in the medical record that Dr. Ashraf rendered any services to decedent. Therefore, we concur with the trial court’s finding that there was no physician-patient relationship because Ashraf never provided any care or treatment.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello